

which would violate the Establishment Clause of the First Amendment to the Constitution. Accordingly, we recommend that the Conference Committee amend the bill to ensure that funds are provided to religious organizations only if they are not pervasively sectarian.

The Act would authorize the Secretary of Health and Human Services ("the Secretary") to establish a program to make federal block grants to states for the purpose of ameliorating the causes of poverty in communities within the states. *See, e.g.*, S. 2206 (as passed by the Senate), §201 (proposing CSBGA §§672(1), 675). The states may, in turn, direct the funds to private, nonprofit organizations to assist in the provision of services. *See, e.g., id.* (proposing CSBGA §§675C(a)(3)(B), 676A(a)(1)(A)).

Proposed CSBGA section 679(a), in both the House and Senate bills, would provide that "the government shall consider, on the same basis as other nongovernmental organizations, faith-based organizations to provide the assistance under the program, so long as the program is implemented in a manner consistent with the Establishment Clause of the first amendment to the Constitution." Section 679(a) further would provide that "[n]either the Federal Government nor a State or local government receiving funds under this subtitle shall discriminate against an organization that provides assistance under, or applies to provide assistance under, this subtitle, on the basis that the organization has a faith-based character."

Section 679 apparently would reflect "Congress' considered judgment that religious organizations can help solve the problems" to which the proposed statute is addressed *Bowen v. Kendrick*, 487 U.S. 589, 606-07 (1988). *Kendrick* and other cases establish that the fact that an institution has religious affiliations does not mean that it may not participate equally in a neutral government financial aid program that benefits both religious and nonreligious entities. *Id.* at 608-11 (Adolescent Family Life Act grants, available to fairly "wide spectrum of public and private organizations" regardless of religious nature, may be awarded to religious institutions), *see also, e.g., Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (plurality opinion) (upholding grant program for colleges and universities as applied to schools with religious affiliations). Nevertheless, the Establishment Clause does place two significant limitations on this general principle.

First, the Establishment Clause requires that federal financial assistance not be used in a way that would advance religious organizations' religious mission. The Court in *Kendrick* confirmed that, even though religious organizations may participate in government-funded social welfare programs, the government must ensure that government aid is not used to advance "specifically religious activit[ies] in an otherwise substantially secular setting." *Kendrick*, 487 U.S. at 621 (quoting *Hunt v. McNair*, 413 U.S. 734 (1973)), *See Roemer*, 426 U.S. at 755 (plurality opinion). Indeed, in *Kendrick*, all nine Justices accepted the principle that government funding of religious activities would be impermissible.¹

¹ 487 U.S. at 611-12, 615, 621 (Establishment Clause would be violated if public monies were used to fund "indocination into the beliefs of a particular religious faith" or to "advance the religious mission" of the religious institution receiving aid.) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985)), *Id.* at 623 (O'Connor, J., concurring) ("[A]ny use of public funds to promote religious doctrines violates the Establishment clause."), *Id.* at 624 (Kennedy, J., concurring) (reasoning that the Establishment Clause would be violated if funds "are in fact being used to further religion"), *Id.* at 634-48 (Blackmun, J., dissenting) (opining that government aid

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 24, 1998.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education and the
Workforce, U.S. House of Representatives,
Washington, DC.

DEAR MR. CHAIRMAN: The Senate and the House each recently passed versions of S. 2206, designated in the Senate as the Community Opportunities, Accountability, and Training and Educational Services Act of 1998 and in the House as the Human Services Reauthorization Act. We are informed that a conference committee will this week attempt to resolve differences between the two versions of the bill. S. 2206 would, *inter alia*, amend the Community Services Block Grant Act ("CSBGA"), 42 U.S.C. §9901, *et seq.* We are writing with respect to a proposed new section 679 of the CSBGA, which would be established by section 201 of the Senate-passed bill and by section 202 of the House-passed bill. We are concerned that the Senate version (that is, S. 2206 as passed by the Senate on July 27, 1998) could be construed to permit government funds to be provided to, and used by, pervasively sectarian organizations,

In conformity with this constitutional requirement, proposed section 679 of the House bill would provide that "[n]o funds provided to a faith-based organization to provide assistance under any program described in subsection (a) shall be expended for sectarian worship, instruction, or proselytization."²

Second, even where a statute includes (as S. 2206 does) an express condition that the federal aid not be used for sectarian worship, instruction, or proselytization, the government nevertheless may not provide aid directly to "pervasively sectarian" institutions, defined as institutions in which "religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission." *Id.* at 610 (quoting *Hunt*, 413 U.S. at 743); see also *id.* at 621 (holding that, apart from the question whether aid was being used for religious purposes, Establishment Clause would be violated if the plaintiffs could show that aid flowed to grantees that could be considered "pervasively sectarian religious institutions").

As the Court has explained, the reason for the prohibition on direct governmental aid to pervasively sectarian institutions is the unacceptable risk that where—as in a pervasively sectarian organization—secular and religious functions are "inextricably intertwined," government aid, although designated for a secular purpose, in fact will invariably advance the institution's religious mission. *Id.* at 610. Again, it is immaterial to this part of the Court's analysis that the provision of assistance would serve a legitimate secular purpose. See *id.* at 602. What is critical is that the assistance also would have the effect of advancing religion because of the pervasively sectarian character of the recipients. And even if it were possible, as a theoretical matter, for a pervasively sectarian organization to use government assistance exclusively for secular functions in such institutions, the degree and kind of governmental monitoring necessary to ensure compliance with the requisite restrictions would itself create Establishment Clause problems. *Id.* at 616-17.

It is unclear which, if any, of the religious organizations that would receive funding under S. 2206 would be "pervasively sectarian." The boundaries of the "pervasively sectarian" category are not well-defined, and the Supreme Court has used it almost exclusively in connection with primary and secondary educational institutions. The Court has, however, indicated that numerous considerations are relevant in determining whether an institution is pervasively sectarian. Included among those considerations is whether an organization has explicit corporate ties to a particular religious faith, and bylaws or policies that prohibit any deviation from religious doctrine. *Kendrick*, 487 U.S. at 620 n. 16. The Court also has treated the existence of religious qualifications for admission and hiring as a relevant factor in determining whether a school is pervasively sectarian. Compare *Hunt*, 413 U.S. at 743-44 (no religious qualifications for faculty or students) and *Roemer*, 426 U.S. at 757-58 (plurality opinion) (same), with *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 767-68 (1973) (religious restrictions on admissions and faculty appointments) and *School Dist. of*

may not be used to advance religion, even if aid was intended for secular purposes). Notably, *Kendrick* involved a statute—like the proposed bill—in which government resources were granted on a neutral, nondiscriminatory basis, to religious and nonreligious groups alike, for a secular purpose (counseling sexual abstinence).

²Proposed §679(c) in the Senate version has a similar prohibition, but limited to "funds through a grant or contract." In order to avoid difficult Establishment Clause questions, we recommend deletion of the "through a grant or contract" limitation.

Grand Rapids v. Ball, 473 U.S. 373, 384 n.6 (1985) (preference in attending private school afforded to children belonging to organizational denomination).

Although both the House and Senate versions of proposed §679(a) state that the block grant funds must be disbursed in accordance with the Establishment Clause, certain other provisions in the Senate version of the bill strongly suggest an expectation that state governments would be permitted to provide direct funding to religious organizations that are pervasively sectarian. In particular, the Senate version includes the following three provisions not found in the House version.

(i) Proposed §679(b)(1)³ would provide that "[a] faith-based organization that provides assistance under a program described in subsection (a) shall retain its faith-based character and control over the definition, development, practice, and expression of its faith-based beliefs."⁴

(ii) Proposed §679(b)(2)(A) would provide, with a minor exception, that "[n]either the Federal Government nor a State or local government shall require a faith-based organization . . . to alter its form of internal governance."

(iii) Proposed §679(b)(3) would provide, *inter alia*, that "[a] faith-based organization that provides assistance under a program described in subsection (a) may require that employees adhere to the religious tenets and teachings of such organization."

These provisions, as well as the bill's repeated references to "faith-based organizations" and recipient organizations' "faith-based character," strongly imply some intent that pervasively sectarian religious organizations would be eligible to receive direct governmental funding. In order to ensure that S.2206 is not construed to permit funding of pervasively sectarian organizations, and that direct governmental funding is not used to support religious activities, we recommend that the Conference Committee not adopt the three quoted provisions (which do not appear in the version of S. 2206 passed by the House). In offering this recommendation, we do not mean to suggest that the government should be able to, for example, "control . . . the definition, development, practice, and expression of . . . beliefs" of a nonpervasively sectarian religious organization that receives CSBGA funds but does not use such funds for sectarian worship, instruction, or proselytization. Nor should we be understood as suggesting that a government may "require" such an organization "to alter its form of internal governance." We merely wish to ensure that the federal, state and local governments involved in disbursing CSBGA funds may take into account the structure and operations of a religious organization in determining whether such an organization is or is not pervasively sectarian. Where such an organization is pervasively sectarian—i.e., where the secular and religious functions of the organization are so "inextricably intertwined," *Kendrick* 487 U.S. at 610, that it would be impossible (at least

³The Senate version of the bill designates this as subsection "(c)," rather than "(b)," but this appears to be a typographical error.

⁴In addition to the constitutional problem discussed in the text, this particular provision would (perhaps inadvertently) raise another Establishment Clause problem, since, read literally, the "shall retain" language would appear to require a recipient organization, as a condition of receiving federal funds, to "retain" a particular religious character and a certain form of "control over the definition, development, practice, and expression of its faith-based beliefs." As a general matter, the government may not, of course, attempt in this manner to control the religious character and organization of a religious organization.

without impermissible entanglement) to ensure that the organization does not use government funds to advance religion, the organization may not receive and use CSBGA funds.

Thank you for your attention to this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

L. ANTHONY SUTIN,
Acting Assistant Attorney General.